**STATE OF NORTH DAKOTA**

**OFFICE OF SECURITIES COMMISSIONER**

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| IN THE MATTER OF: | ) | |
| | ) | |
| Preferred Trust and Management, | ) | **RECOMMENDED** |
| LTD, Randy Bryans, Ron Stafford, | ) | **FINDINGS OF FACT,** |
| Tony Kautt, Todd Haskins, | ) | **CONCLUSIONS OF LAW,** |
| and Leon Borud - Consolidated Hearing | ) | **AND ORDER** |
| | ) | |
| Respondents. | ) | |

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On April 10, 2001, the Securities Commissioner issued a separate Cease and Desist Order, Notice of Civil Penalty, and Notice of Right to Request a Hearing to each of the five above named individual Respondents. On August 21, 2001, the Securities Commissioner requested the designation of an administrative law judge ("ALJ") from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, and a recommended order in regard to three of these matters (Bryans, Stafford, and Kautt). On April 22, 2003, the Securities Commissioner requested the designation of an ALJ from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, and a recommended order in regard to the other two of these matters (Haskins and Borud). On August 24, 2001, the undersigned ALJ was designated to preside as hearing officer for the three matters. On April 24,2003, the undersigned ALJ was designated to preside as hearing officer for the two matters.

The ALJ consolidated these five separate matters because the same attorney, Mr. Tom P. Slorby of Minot, eventually came to represent all five individuals and the five matters are similar. Both parties agreed to consolidation.

The three earlier matters were stayed and continued pending the appeal on a related matter before the Commissioner to the District and Supreme Court. *Henry, et al v. Commissioner*, 2003 ND 62. *See* November 15, 2001, Stipulation for Stay of Proceedings and Continuance.

On April 15, 2003, the Supreme Court issued its decision in *Henry, et al v. Commissioner*. The Court dismissed the appeal because it said the Commissioner's July 31, 2001, Order was not a final order.

On May 8, 2003, the ALJ issued a Notice of Consolidated Hearing in regard to Bryans and Stafford. The hearing was scheduled for July 21, 2003. Later Kautt (who originally had a different attorney) and Haskins and Borud were consolidated with this matter. The hearing was held as scheduled on June 21, 2003, in the Office of Administrative Hearings, Bismarck, North Dakota. Special Assistant Attorney General Matthew O. Bahrenburg represented the Securities Commissioner. The Respondents were all present and were represented at the hearing by Mr. Slorby. The Securities Commissioner called as witnesses its investigator and examiner, Kelly Mathias, all five of the respondents, and several other witnesses. During the course of his testimony Mr. Mathias was qualified as and declared an expert on high yield investment fraud and prime bank fraud. The Commissioner offered many exhibits. The Respondents offered one exhibit. *See* attached exhibit list. Two exhibits offered were withdrawn, exhibits W-3 and W-4. Exhibits E, G-Q, R and F were conditionally admitted over objection by Respondents. The parties briefed the matter of their admission. The rest of the exhibits were all admitted. Again, see exhibit list. The Respondents called one witness, Mr. Gerald Haskins, father of Respondent Todd Haskins.

On July 23, 2003, the Commissioner filed a letter brief on the evidentiary matter. On August 12, 2003, the Commissioner file the Commissioner's "Post-Hearing Brief and Closing Argument." On August 29, 2003, the Respondents filed their letter brief which addressed only the evidentiary matter of the conditional exhibits. On September 11, 2003, the ALJ received the Commissioner's email correspondence stating that no reply brief would be filed. Accordingly, the record in this matter was closed on September 11, 2003, pending the issuance of the hearing officer's recommended decision and the final decision of the Securities Commissioner.

As to the evidentiary matter, the ALJ **strikes** the admission of exhibits E, G-Q, R and F as to the five named Respondents in this matter. In an Order on Motion in Limine issued by the ALJ on June 4, 2003, in regard to all of the Preferred Trust and Management, LTD ("Preferred Trust") matters ( there were many more individual Respondents than these five), the ALJ allowed the admission of trial and deposition testimony of three witnesses, in lieu of them appearing at the hearing, as foundation for certain evidence documents taken from the computer of Fred Keiser, the promoter and principal of Preferred Trust. The ALJ did not rule on the admissibility of the documents from the Fred Keiser computer. The ALJ said that if proper objection is made as to the relevancy of any documents as to any specific Respondent, the Securities Commissioner must make a showing as to how the documents are relevant (admissible) as evidence as to the objecting Respondent. June 4 Order on Motion in Limine.

Exhibits E, G-Q, R and F are hearsay documents seized from and found on the Fred Keiser computer, but the question under the business records exception to the hearsay rule is whether they are true and correct copies of records of Preferred Trust kept in the ordinary course of business of that entity, and, even if they are true and correct copies of Preferred Trust records, whether they are reliable, relevant records.

There was no one at the hearing associated with Preferred Trust in such a way as to be able to testify as to whether the offered exhibits were true and correct copies of records or, even if they were true and correct copies of records, whether they are reliable, relevant records as to the individual Respondents. Accordingly, the documents may be admissible against Fred Keiser, but he is not a party to this matter. The documents may also be admissible as to the Respondent Preferred Trust. The documents are not admissible as to any of these five individual Respondents. There is no foundation that the offered exhibits are the official business records of Preferred Trust and no testimony about for what the offered records are used. (Exhibit F is Mattheis's summary of the other offered records.)

Under the cases cited by the Commissioner, *U.S. v. Hathaway*, 798 F. 2d 902 (6th Cir. 1986) and *Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988), some witness must be familiar with the record keeping system of Preferred Trust for these records to come in. No witness was familiar with the offered exhibits. There was no knowledge available about the procedures under which the records were created. There was no evidence about what these records mean in the business context, if anything, for Preferred Trust. There was nothing reliable offered in regard to how to interpret these records, especially not as to these Respondents. Mr. Mathias testified about them and could even make a summary about them. He could interpret them and he said that they should be interpreted in their ordinary sense, according to common sense. However, clearly, the offered exhibits were not common and ordinary business records of a legitimate investment business. Mathias, both counsel, and many of the witnesses recognized the Fred Keiser business records as part of an investment scheme, a fraudulent investment scheme. They were not ordinary in any sense and not subject to interpretation by common meaning or ordinary

sense. They are evidence of a concocted, fraudulent scheme. But, what they really mean is the subject of speculation.

Alternatively, the ALJ could have admitted the offered exhibits as to the Respondent Preferred Trust but given them little if any weight as to the individual Respondents because the documents, as to the individual Respondents, were not in any way shown to be reliable, relevant evidence. In fact, there was much evidence at the hearing from those testifying, both respondents and others, that at least some of the specifics of the offered exhibits were not correct and were not reliable. There was evidence at the hearing that the meaning of some of the words used by the author of the records (and even the author is not known for certain, though it is assumed to be Fred Keiser) are in need of further explanation because their use is not clear in this context and even if one believes he knows what they mean, there are some errors in the records following that assumed usage. These exhibits should be stricken.

Based on the evidence admitted at the hearing, including testimony, and the briefs of the parties, the administrative law judge makes the following recommended findings of fact and conclusions of law.

## FINDINGS OF FACT

1. The Securities Commissioner investigated the activities of Mr. Frederick W. Keiser of Minot and seized a computer from him. As a result of that investigation, separate Cease and Desist orders were issued against Preferred Trust and, amongst others, the five individual Respondents in this matter.

2. Much of the documentary evidence offered and admitted at the hearing in this matter was documentary evidence obtained from Mr. Keiser's computer or from the website of Preferred Trust. The entire contents of the Keiser computer and hard drive, according to the

assertions of the Commissioner, voluminous contents, were transferred to a CD. Exhibits A, B, and C are documents copied from the website of Preferred Trust. However, exhibits E, G-Q, and R are not from the Website of Preferred Trust but, apparently, from the business records of Preferred Trust in Mr. Keiser's possession, taken from his computer and transferred to the CD. Again, exhibit F is the investigator's summary of that information from the CD.

3. Exhibits A-C, and other exhibits, identify Preferred Trust as a fraudulent investment scheme. Mr. Mathias testified that Preferred Trust is a fraudulent investment scheme. There was no evidence offered to the contrary. In fact, many witnesses, including the Respondents, agreed that it was fraudulent.

4. The Preferred Trust investment scheme (hereinafter the "scheme") is a security as defined in N.D.C.C. 10-04-02(15).

5. The scheme was not registered as a security in North Dakota and is not exempt from registration under the Securities Act. N.D.C.C. §§ 10-04-04; 10-04-05. Neither is the scheme an exempt transaction under N.D.C.C. § 10-04-06.

6. The respondent, Randy Bryans, is not currently and has never been registered as a securities investment advisor representative or securities agent in North Dakota.

7. The respondent, Ron Stafford, is not currently and has never been registered as a securities investment advisor representative or securities agent in North Dakota.

8. The respondent, Tony Kautt, is not currently and has never been registered as a securities investment advisor representative or securities agent in North Dakota.

9. The respondent, Todd Haskins, is not currently and has never been registered as a securities investment advisor representative or securities agent in North Dakota.

10. The respondent, Leon Borud, is not currently and has never been registered as a securities investment advisor representative or securities agent in North Dakota.

11. The documents from the Keiser computer showing that each of the respondents are listed as having referred other individuals to the scheme are not admitted. There is no other evidence showing an offer or sale of any security by any of these five respondents. There is no evidence showing any transaction between any of the respondents and someone underneath them or someone somehow related in a business or other fashion to them in the scheme's records in evidence, *i.e.,* there is no evidence of a purchase. There is no record of any payment being made by anyone for anything. The testimony of witnesses only shows that the five Respondents were at some time possibly entitled by some designation made by Fred Keiser to compensation from securities referrals, and monies were possibly earmarked for them, but no actual offer or sale by any of these Respondents has been proven. Even with the evidence of the exhibits excluded in this matter, however, nothing conclusive, only possibilities based on an inadequate amount of information, is shown. *See* recommended decision on another Preferred Trust consolidated matter before the Commissioner regarding Preferred Trust, dated July 23, 2003. (Henry, Skarphol, Henry).

12. There is no evidence showing that the words "referred" or "entitled to receive" or "earmarked," frequently used in the stricken documents or the testimony at the hearing to apply to activities of the five respondents, equate with the statutory requirements of the words "offer," "sale," and "purchase." There is no action or conduct by any of the Respondents that clearly pertains to the word "referred" or that entitles them to receive anything. Clearly nothing was actually earmarked for them as none of them received anything. Clearly, this was all a scheme devised by Fred Keiser. Perhaps, if it had been allowed to play out further, Keiser's web would

have entangled more victims and some of those victims could have been shown to have gone along with the scheme to the extent that they were more than victims, but that did not happen here, at least with these five Respondents.

13. Similarly, as the evidence does not show any offer, sale, or purchase of any security, directly or indirectly, only the possibility of offer, sale, or purchase of securities, it also does not show any "device, scheme, or artifice to defraud" investors employed by any of the Respondents in any offer, sale, or purchase of securities. N.D.C.C. § 10-04-15. Clearly, the scheme is a "device, scheme, or artifice to defraud." But, any evidence, especially anything direct, proving a conclusive connection between the Respondents and anyone else is missing. Possibilities are certainly evident, but, again, the evidence showing a violation of law it is missing.

## EVALUATION OF THE EVIDENCE

The Securities Commissioner's case in this matter is not proven by the greater weight of the evidence. The word that comes to the mind of the ALJ after listening to the testimony and reviewing the evidence in this matter, even if one includes the stricken evidence for consideration in this matter, is "victim." The Respondents in this matter are all victims of a fraudulent investment scheme; none are not securities agents or securities investment advisor representatives.

It is clear that these five Respondents were not even sophisticated investors, much less securities agents or securities investment advisor representatives. None of them had more than a high school education, several of them less. They each knew very little about what was going on with this investment opportunity that they all invested in, too, except that they thought they had an investment whereby each of them and others they told about it could make some money.

None of them realized until much later, after they had invested, and after people they told about it had invested, likely after the scheme started to unravel, that this was a fraudulent investment scheme known as a "high yield investment fraud" or "prime bank fraud." None of these Respondents had anything to do with the structuring of this investment scheme. Any relation they may have had to a so-called opportunity to receive moneys from referrals they made or bonuses to be paid was only because of a scheme apparently perpetrated by Fred Keiser, and likely, by him alone.

Again, there is no evidence of any kind about the way this business, Preferred Trust, actually operated or what all of the documents (the stricken, offered exhibits) actually mean as to these Respondents. None of these Respondents, the evidence shows, had anything to do with the structure of this fraudulent scheme. In fact, the evidence shows, they were incredibility ignorant about the scheme and its actual operations. They were taken in by Fred Keiser, taken in by the scheme. They were victims, just as much as anyone else. They all lost money and many of the people they told about Preferred Trust lost money, too.

True, all of the Respondents expected to make money from their investments with Preferred Trust, but not as securities agents or securities investment advisor representatives, not as a business person but, rather, as investors themselves. All of the people that they told about Preferred Trust expected to make money too, as investors. The evidence shows that none of them expected the Respondents to make money from referring others as investors to Preferred Trust. There was no investor-agent relationship established between any of the Respondents and anyone else. Rather, the evidence shows, there was only a relationship of mutual investors, talking about investing in the same investment scheme, which turned out to be a fraudulent investment scheme. All these Respondents referred someone else to Fred Keiser for an

investment opportunity. Some of them referred someone else to the Preferred Trust Website. But, it was Keiser who took it from there. None of these five Respondents had any business relationship with Keiser or Preferred Trust such that they could in any way be considered an agent for them. None of these Respondents had a business relationship with any of the people whom they supposedly referred for investment. These so-called referrals were just friends, relatives, personal acquaintances to whom they pointed out Fred Keiser and Preferred Trust. In some cases the evidence shows that a Respondent did not even know the person whom they supposedly referred. The evidence does not show even one witness who thought he brokered an investment through one of the Respondents. They all believed that they had brokered through Fred Keiser.

There is no showing, even with the evidence of the stricken exhibits, how, when, and in exactly what were the Respondents involved with regard to this fraudulent investment scheme. They themselves, the evidence shows, were considerably in the dark. There was no evidence that any of the Respondents saw Fred Keiser's computer records or were in any way involved with Fred Keider's computer records, other than one or more saw a printout as it concerned their investment. None of them really knew what was meant by the provision from which they were supposed to get bonuses. None of them actually got bonuses. It was apparently Fred Keiser's fraudulent investment scheme, and his alone (at least the evidence at this hearing points to no one else), that he had structured and perpetuated unbeknownst, in large part, to the Respondents. It was apparently Fred Keiser, and him alone, who actually reaped the financial rewards from the Respondents and all the people that the Respondents told about the scheme.

## CONCLUSIONS OF LAW

The greater weight of the evidence does not show any violations of N.D.C.C. ch. 10-04 by Randy Bryans, Ron Stafford, Tony Kautt, Todd Haskins, or Leon Borud.

## RECOMMENDED ORDER

Because the greater weight of the evidence shows that, neither Randy Bryans, Ron Stafford, Tony Kautt, Todd Haskin, nor Leon Borud violated any of the provisions of N.D.C.C. ch. 10-04, the Cease and Desist Order issued against each of them is **dismissed**.

Dated at Bismarck, North Dakota, this 25th day of September, 2003.

State of North Dakota
Karen Tyler
Securities Commissioner

By: _____

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